IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RICHARD CARTER CRABTREE, Petitioner.	)	2 CA-CR 2007-0138-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021256

Honorable Michael Alfred, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Crabtree — Tucson
In Propria Persona

B R A M M E R, Judge.

¶1 A jury found petitioner Richard Crabtree guilty of burglary, aggravated assault of a dangerous nature, and theft. The trial court imposed concurrent, enhanced, aggravated prison sentences, the longest a fifteen-year term, and we affirmed the convictions and sentences on appeal. *State v. Crabtree*, No. 2 CA-CR 2003-0122 (memorandum decision filed Feb. 11, 2005). Crabtree then filed a notice of post-conviction relief pursuant to Rule

32, Ariz. R. Crim. P., 17 A.R.S., claiming in the ensuing petition that trial counsel had been ineffective in failing to interview an eyewitness whose testimony "would have cast doubt on the victim's testimony that Crabtree had committed an aggravated assault." In the alternative, Crabtree asked the court to reduce his sentence. The trial court dismissed the petition without an evidentiary hearing, and this petition for review followed. We review a trial court's grant or denial of post-conviction relief for an abuse of discretion, *see State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and find no abuse here.

¶2 As summarized in our decision in Crabtree's appeal, the basic facts are that two victims, Kolin and his mother, arrived at home mid-day and discovered a burglary in progress. They found Crabtree hastily leaving their ransacked house carrying a pillowcase containing various items that belonged to them. Confronted outside the house by Kolin, Crabtree immediately began to run, and Kolin ran after him. Kolin chased Crabtree for some distance until police officers ultimately arrived and took him into custody. Crabtree had dropped the pillowcase during the chase, which led to the eventual recovery of the victims' property.

¶3 During the pursuit, Kolin caught up to Crabtree more than once, the first time in an alley. Kolin testified Crabtree had said, "I'm leaving, I'm leaving," but then produced a pair of scissors from his clothing, lunged at Kolin, and inflicted an injury the victim described as "a scrape or a cut." From a distance of roughly two residential lots away,

Kolin's brother could see "some kind of an altercation" or "tussle[]" between the two and afterward saw Crabtree "toss[] a pair of silver scissors next to a chain-link fence."

¶4 In his petition below, Crabtree claimed trial counsel was ineffective in failing to interview James Carroll, an eyewitness to a portion of Kolin's pursuit of Crabtree, whose testimony "would not have corroborated" Kolin's account of Crabtree's having attacked him with scissors. In support of his petition, however, Crabtree submitted no affidavit from Carroll. Instead, he submitted the affidavit of a defense investigator who stated he had contacted Carroll several times by telephone between May and August 2006, more than four years after the events had occurred and more than three years after Crabtree's trial. Carroll's statements, as reported in the investigator's affidavit, do not affirmatively contradict Kolin's testimony but establish only that Carroll "did not see" the events Kolin described. Why Carroll "did not see" those events—whether because they did not occur or because Carroll simply was not in a position to observe them—is unanswered by the investigator's affidavit.[1]

¶5 Crabtree submitted his own affidavit in which he stated that he had "repeatedly asked [his] trial counsel" to interview Carroll but that, to the best of Crabtree's knowledge, counsel had not done so. But Crabtree supplied no affidavit from trial counsel, thus leaving unestablished whether counsel did or did not contact or attempt to contact Carroll, what

[1]Because no other similarly situated witness is mentioned in the record, we assume Carroll might have been the neighbor described in Kolin's brother's testimony as follows: "And then a neighbor in the alley kind of down the street, came hobbling out and started chasing after them also. But he was quite a ways behind and he was having problems keeping up and I think he fell down out in the desert area."

Carroll's testimony might have been, whether Carroll would have been available in March 2003 to testify at trial, and whether counsel had specific reasons for whatever trial preparation he actually pursued. Crabtree similarly provided no extrinsic support for his assertion that counsel's alleged, but unconfirmed, failure to interview Carroll or call him to testify at trial fell below a reasonable professional standard of care under the circumstances.

¶6 To warrant an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner must present a colorable claim—that is, one with a sufficient appearance of validity that, if the petitioner's factual allegations are true, might have produced a different outcome. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990); *State v. Verdugo*, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (App. 1995). "To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). There is, moreover, "a strong presumption that counsel act with reasonable competence." *State v. Krum*, 183 Ariz. 288, 292 n.6, 903 P.2d 596, 600 n.6 (1995); *State v. Walton*, 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989).

¶7 We cannot say the trial court abused its discretion in finding Crabtree had not alleged a sufficiently colorable claim to justify an evidentiary hearing. He failed to establish that, in fact, trial counsel had not contacted Carroll, leaving open the possibility that counsel

had done so and had had a strategic reason for not calling Carroll as a witness. Crabtree offered no extrinsic support for his assertion that counsel's assumed failure to have interviewed Carroll or called him to testify at trial was a departure from the prevailing standard of care for defense counsel under the circumstances. And Crabtree failed to allege actual prejudice, asserting only that Carroll's testimony would not have corroborated Kolin's account, not that Carroll's testimony would have directly contradicted Kolin's.

¶8 The determination whether a claim is sufficiently colorable to warrant an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). Finding no abuse of the trial court's exercise of its discretion here, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge